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NO. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1994

In Re: JAMES CONSTANT,

PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR EXTRAORDINARY WRIT

James Constant
1603 Danbury Dr
Claremont, CA 91711
(909) 624-1801

Pro-per Petitioner

6th PP

QUESTIONS PRESENTED

1. Whether the Court of Appeals abused its discretion in entering a pre-filing order, first, on the basis that it made no substantive findings of frivolousness on questions of lack of jurisdiction of the subject matter raised in the contents of petitioner's filings and, second, on the basis that the pre-filing order is overly broad.

2. Whether the Court of Appeals lacked discretion in entering a pre-filing order, first, on the basis that it had a duty to determine the questions of lack of jurisdiction of the subject matter raised by petitioner and, second, on the basis that a litigant cannot be coerced into accepting counsel rather than proceeding pro-se.

3. Does the pre-filing order violate petitioner's rights of free speech, petition, and due process as guaranteed by the First and Fifth Amendments.

4. Whether this Court should exercise its discretion to issue a writ of prohibition/mandamus to stay the pre-filing order and to mandate that decisions shall be obtained on questions of jurisdiction raised by the petitioner?

5. Whether this Court should determine the merits of questions of jurisdiction raised by petitioner, or should, instead, remand the cause to the Court of Appeals to determine such issues?

6. Whether the questions of jurisdiction set forth in Part VII A and B *infra* shall be the ones for decision?

7. Whether the principle of finality of judgements shall be permitted to compromise the principle of validity of judgements.

PARTIES

The judges of the respondent Court of Appeals are named in the caption of APPENDIX A.

Other parties against whom relief is sought are named in APPENDIX C to this petition.

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PETITION FOR EXTRAORDINARY WRIT TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner James Constant petitions this Court to issue a writ of prohibition and mandamus to the respondent Court of Appeals, and shows as follows:

OPINION BELOW

The Court of Appeals Order entered on 20 October, 1994 appears in APPENDIX A to this Petition.

THIS COURT'S JURISDICTION

Authority to grant the writ of prohibition/mandamus, sought by petitioner herein, is conferred on this Court by the provisions of Section 1651(a) and (b), Title 28, United States Code, and Rule 20 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment (freedom of speech and petition); Fifth Amendment (due process); jurisdictional statutes 28 USC 1338, 28 USC 1331, 28 USC 1343, 28 USC 1334, 28 USC 157 (b)(2)(B),(C),(H), 11 USC 544(b); Civil Rules 12(h)(3) and 54(b); judgement lien statute 28 USC 1962; and patent statute 35 USC 261 are set forth in APPENDIX D.

STATEMENT OF THE CASE

In earlier cases petitioner's 3 complaints for patent infringement and 1 complaint for lack of jurisdiction of the subject matter were dismissed on issues of defense and procedure. No patent claims or claims for lack of jurisdiction of the subject matter were actually litigated and expressly determined. In 1989, as a result of demands by creditors in earlier cases, petitioner filed for bankruptcy during which he initiated four adversary proceedings against creditors and judges involved in earlier cases (hereafter "debtor's case"), and the bankruptcy trustee initiated one adversary proceeding against debtor's wife (hereafter "wife's case").

As debtor in his bankruptcy case, petitioner initiated nine appeals. A list of appeals, subject matter jurisdiction and list of adverse parties appears in APPENDIX C. Claims of lack of jurisdiction were raised by debtor in the Bankruptcy and District Courts and in the nine appeals in the Court of Appeals. Thus, debtor initiated a suit against creditors and others under a bankruptcy statute (objections to creditor's money claims and counterclaims against creditors) alleging *inter alia* lack of jurisdiction of the subject matter[1]. Creditors defended on grounds

[1] Specific allegations include (1) a patent law defense of patent invalidity is not a claim for purposes of jurisdiction under 28 USC 1338 and a defense or procedure is not a claim under 28 USC 1331 and 1343 in earlier cases; and (2) a defense of res judicata is not a claim for purposes of jurisdiction under 28 USC 157 (2)(b)(B) and (C) and a defense or procedure is not a claim under 28 USC 1331 and 1343 in debtor's case.

of res judicata. And, in debtor's case, debtor opposed the enforcement of creditor's money judgement against his United States Patents; and debtor brought a motion to intervene in wife's case; and, in wife's case, debtor brought an appeal from an order transferring 22 United States patents from debtor's wife to the bankruptcy trustee, in each instance alleging *inter alia* lack of jurisdiction of the subject matter[2].

The Court of Appeals affirmed the District Court's dismissals on issues of defense or procedure in all nine appeals. No claims raised by the debtor, including claims for lack of jurisdiction of the subject matter, were actually litigated and expressly determined in the courts below.

On 28 September, 1994 the Court of Appeals *sua sponte* ordered the debtor to respond and show cause why he should not be barred from filing notices of appeal and petitions if he proceeds pro-se. The order does not apply if the debtor has counsel or the lower court certifies that the appeal is not frivolous.

Debtor's response contains specific allegations that the Court of Appeals lacked jurisdiction of the subject matter in all nine appeals. A copy of debtor's response appears in APPENDIX B and is essential to an understanding of the instant peti-

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[2] Specific allegations include (1) patent statute 35 USC 261 bars the jurisdiction of a court to assign or to void the assignment of United States patents by operation of California State law; and (2) judgement lien statute 28 USC 1962 bars the jurisdiction of a court to hear a suit to assign or to void the assignment of United States patents by operation of California state law.

tion.

On 20 October, 1994 the Court of Appeals issued its pre-filing review Order APPENDIX A. In issuing its order, the Court of Appeals again refused to determine the questions of lack of jurisdiction of the subject matter raised by the debtor.

The following questions were raised by debtor in the original complaint or motion, in the nine appeals, and in his response to the pre-filing order:

A. Debtor's Case

1. Whether the authority in *Christiansen v. Colt Industries* (1980) 108 SCt 2166, 100 LEd2d 811 supports debtor's allegations that the courts lacked jurisdiction of the subject matter in earlier cases and in debtor's case (see footnote 1 *supra*).

2. Whether patent statute 35 USC 261 bars the jurisdiction of a court to assign debtor's United States patents to a U.S. Marshall by operation of California state law (see footnote 2 *supra*).

3. Whether California state law Calif. Code 695.010 applies to debtor's patents for the enforcement of creditor's post-petition money judgement.

B. Wife's Case

1. Whether federal patent statute 35 USC 261 is the applicable law under 11 USC 544(b) to void the transfer of United States patents.

2. Whether patent statute 35 USC 261 bars the jurisdic-

tion of a court to void the assignment of wife's patents and to assign wife's patents by operation of California state law (see footnote 2 *supra*).

3. Whether Cal. Code 3409.04 and 3409.05 are inapplicable under 11 USC 544(b) to void the transfer of United States patents.

4. Whether judgement lien statute 28 USC 1962 bars earlier judgement lien creditors (and the trustee who fills their shoes) from bringing suit in California to assign debtor's United States patents and to void and to assign wife's United States Patents.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The relief herein sought is not available, and there is no adequate remedy, in the Court of Appeals or any other court other than this Court for the following reason: all appeals have been finally exhausted. Petitions for certiorari in eight of the underlying nine appeals have been denied by this Court[3].

The issues involved in the present proceedings are of ex-

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[3] Petitioner moves the Court to consider underlying Appeal No. 94-55053, whose Petition for Certiorari is now pending before this Court (No. 94-782), as part of the present petition for an extraordinary writ on the ground that the questions of lack of jurisdiction are identical in underlying Appeal No. 93-56266 whose appeals have been exhausted. See APPENDIX C footnote 2.

ceptional character and of great public importance of holding courts to their prescribed jurisdictions.

A. Abuse And Lack Of Discretion

Initially, it is noted that the Court of Appeal's pre-filing order makes no substantive findings of frivolousness. *De Long v. Hennesy* (CA9 1990) 912 F2d 1144,1148. To make such a finding, a court needs to look at "the number and content of the filings as indicia" of the frivolousness of the litigant's claims. *Id.* As to the number of filings, a bankruptcy case, unlike the typical civil case, can involve several discrete disputes within it which are disposed of over the course of several years. The nine appeals alleging lack of jurisdiction were discrete disputes within debtor's bankruptcy case. All nine appeals would not have been necessary had the Court of Appeals actually litigated and determined the issue of its jurisdiction raised by the debtor in the first appeal. The Court of Appeals cites no authority for the proposition that nine appeals in a single bankruptcy case are excessive. As to the content of the filings, since the Court of Appeals did not actually litigate and expressly determine the issue of its jurisdiction raised by the debtor, it has no basis other than its own arbitrary assumption of jurisdiction, as indicia of the frivolousness of debtor's filings.

It is further noted that the pre-filing order is overly broad because it restricts debtor from filing all actions rather than restricting debtor from filing actions which seek to "relitigate issues which he raised in previous cases specifically named". *De Long, supra* at 1148.

Finally, debtor has a statutory right under 28 USC 1654 to self-representation. The Court of Appeals cites no authority for the proposition that it has the power to deprive debtor of his right to self-representation. A necessary part of the right to self-representation is that a litigant, especially in a civil case, cannot be coerced into accepting counsel rather than proceeding pro-se. Neither the court's authority nor duty extend beyond urging debtor to obtain legal counsel. *Andrews v. Bechtel Power Corp.* (CA1 1985), 780 F2d 124, 137, *cert. den.* 106 SCt 2896, 476 US 1172, 90 LEd2d 983. See also *U.S. v. Warner* (CA8 1970), 428 F2d 730, *cert. den.*91 SCt 194, 400 US 930, 27 LEd2d 191 (Judge cannot insist that defendant obtain counsel or accept appointment of counsel).

B. Lack Of Jurisdiction

The inferior courts must be held to a lawful exercise of their prescribed jurisdiction. *Roche v. Evaporated Milk Asso.* (1943) 319 US 21, 87 LEd 1185, 63 SCt 938; *U.S. Alkali Export Asso. v. U. S.* (1945) 325 US 196, 89 LEd 1554, 65 SCt 1120; *Banker's Life & Casualty Co. v. Holland* (1953) 346 US 379, 98 LEd 106, 74 SCt 145; *Will v. United States* (1967) 389 US 90, 19 LEd2d 305, 88 SCt 269. See also *Schlagenhauf v. Holder* 379 US 104, 13 LEd2d 152, 85 SCt 234; *Gulfstream Aerospace Corp. v. Macayamas Corp.* (1988 US) 99 LEd2d 296, 108 SCt 1133.

In all nine appeals, the Court of Appeal's decisions have refused to actually litigate and expressly determine the issues of lack of subject matter jurisdiction raised by the debtor. Its

decisions are based on issues of defense and proceedure without an inquiry into the question of subject matter jurisdiction. Two approaches can be taken to the situation. One is to say that the issue of subject matter jurisdiction remains wholly open and the judgement therefore is indefinitely subject to attack on that ground. This was the traditional view, still adhered to in some decisions, including decisions of this Court. See *Restatement (Second) of Judgements* 12 *Comment b* at page 117 and Reporter's Note to *Comment b* at page 125. The other approach is to say that the issue of subject matter jurisdiction is implicitly resolved by the act of entering judgement. On this view, the entry of judgement is taken as equivalent to actual litigation of the issue of subject matter jurisdiction and hence results in its becoming res judicata. See *Id Comment d* at page 121 and Reporter's Note on *Comment d* at page 126. Apparently, it is the "implicitly resolved" approach that is taken by the Court of Appeals.

The rule has been that a court's determination that it has subject matter jurisdiction is res judicata of the issue, if the jurisdictional question actually was litigated and expressly decided. *Stoll v. Gottlieb* (1938) 59 SCt 134, 305 US 165, 83 LEd 104. However, the result in *Chicot County v. Baxter State Bank* (1940) 60 SCt 317, 308 US 371, 84 LEd 329 held that a party who does not actually contest the court's subject matter jurisdiction also will be bound by the judgement. The *Chicot County* case appears to overrule earlier decisions to the contrary. See *Grubb v. Public Utilities Comm'n* (1930) 50 SCt 374, 281 US 470, 74 LEd 972 (jurisdiction may be challenged).

It is clear that there is a conflict of decisions in the two approaches. The law is not settled on the issue of when a judgement can be attacked. Indeed, this Court has declared that the prior cases had created "no inflexible rule as to collateral objection". *U.S. v. U.S. Fidelity & Guar. Co.* (1940) 60 SCt 653,657, 309 U.S.506,514. Subsequently, collateral attack was permitted in several cases in which the jurisdictional issues were not actually litigated in the first forum. See *cases identified in Durfee v. Duke* (1963), 84 SCt 242, 247 n. 12, 375 US 106, 114 n. 12, 11 LEd2d 186[4]. This means that, as here, the courts below need not fulfill the requirements for adjudicating claims under jurisdictional statutes 28 USC 1338,1331, 1343, and 28 USC 157(b)(2) (B),(C), and (H) and Civil Rule 54(b), the rule for entry of final judgements based on claims, since they only need to render judgements on issues of defense or proceedure and then say that their jurisdiction is implicitly resolved by the act of entering otherwise non-final judgement. If a court's jurisdiction is "implicitly resolved" upon entry of a "judgement" based on a defense or proceedure then what is the purpose of the jurisdictional statutes and the civil rule for entry of final judgements based on claims? Clearly, what the legislature has done in enacting the jurisdictional statutes (requiring the determination of claims) has been undone by the Court of Appeals in its adoption of the "implicitly resolved" approach (permitting defenses instead of claims for purposes of jurisdiction and entry of final judgements).

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[4] In *Durfee* itself the first court's jurisdictional power was contested and actually decided.

This Court should grant the writ sought by the debtor and should itself determine the merits of the questions raised by debtor in order to resolve conflicts between the two approaches and to protect its appellate jurisdiction. The issues concern the construction and application of jurisdictional statutes 28 USC 1338,1331,1343, and 28 USC 157(b)(2) (B),(C), and (H) and Civil Rule 54(b). *La Buy v. Howes Leather Co.* (1957) 1 LEd 290,297 (mandamus should issue to prevent an action under a rule so as to place it beyond the scope of the rule).

When the issue of jurisdiction is actually litigated and then a failure to seek review of the determination of the issue occurs there is reason to be confident that the public interest in the observance of limitations on jurisdiction has not been substantially violated. *Restatement (Second) of Judgements* 12 *supra at 121.* However, failure to seek review does not waive the issue of jurisdiction, which can be raised at any time. Civil Rules 12(h)(3) and 60(b)(4).

When the issue of subject matter jurisdiction has been only "implicitly resolved" and then is raised through an attack on the judgement it signifies that the adversary system, here repeatedly, has failed to bring forward a highly relevant issue in the original proceeding. It is when the contention of subject matter jurisdiction has some substantial merit, as here, that the application of the rule of res judicata poses a real dilemma. *Id.*

In the instant petition, the Court of Appeals has refused to litigate the issue at least ten times, in the nine underlying appeals and in its pre-filing review Order APPENDIX A. Indeed,

the cause of the pre-filing review Order and the nine appeals filed by debtor is the repeated refusal by the Court of Appeals to determine the issues of its jurisdiction raised by debtor. There is only one way to find out if debtor's contention of lack of subject matter jurisdiction has some substantial merit, namely, a court must exercise its duty to actually litigate and expressly determine the issue.

The question then is whether this Court shall permit, in the interest of securing conformity to the rules of jurisdiction, the revival of a question that the Court of Appeals should have determined in the first instance. It is clear that if a matter is a duty of the court, a party has a clear and indisputable right to a result so as to support a demand for mandamus. *Will v. Calvert Fire Ins. Co.* (1978), 437 US 655, 57 LEd2d 504, 98 SCt 2552, on remand (CA 7) 586 F2d 12.

As formulated by the modern approach, the interests primarily at stake are governmental and societal, not those of the parties. To allow debtor to raise the question of subject matter jurisdiction is in effect to make him a public agent for enforcing the rules of jurisdiction. See *Restatement (Second) of Judgements* 12 *supra.*

In the modern approach, the question reduces to whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a vindication of the rule by a litigant, the debtor, who is deserving of a determination on the issues of subject matter jurisdiction raised by him in the courts below. The public interest is of that strength only if the

Court of Appeal's excess of authority was plain or has seriously infringed the jurisdiction of this Court or has infringed a fundamental constitutional protection. *Id.* All three elements of the public interest are present here.

First, in the courts below, petitioner repeatedly claimed the lack of jurisdiction of the subject matter. If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue. See numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2. The district court's and the appeal court's excess of authority was plain because their decisions were made without an inquiry into the question of subject matter jurisdiction raised by petitioner; **Second**, this Court's appellate jurisdiction was seriously infringed by the Court of Appeal's usurpation of power; and, **Third**, debtor's fundamental protections of due process were infringed[5].

To summarize the situation, debtor has initiated nine appeals alleging lack of jurisdiction of the subject matter in each appeal. The adverse parties defend on grounds of res judicata and civil rules. Judgements are for the adverse parties without determination of issues of lack of jurisdiction raised by the debtor. The debtor may subsequently attack the judgements using two approaches, first, on the traditional ground that the

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[5] As alleged in the complaints in debtor's case, "Judgements in Earlier Cases And in Instant Case Based On Affirmative Defenses Deprive Petitioner's Rights To Be Heard On Claims Of His Complaints".

issue of jurisdiction remains wholly open and the judgement(s) therefore are indefinitely open to attack and, second, on the modern ground that res judicata is subject to exception when the policy of the finality of judgements is outweighed by other factors, here because the courts below acted in plain excess of their authority, in infringement of this Court's jurisdiction, and in infringement of debtor's fundamental constitutional protections.

C. Separation Of Powers

While debtor raised the issue of the court's lack of subject matter jurisdiction in all complaints and motions in the courts below, and thus has a clear and indisputable right to a result so as to support a demand for mandamus, *Will v. Calvert, supra*, the principle of finality followed by the Court of Appeals has seriously impaired debtor's right to be heard on his claims, based on jurisdictional statutes and Civil Rule 54(b), and will be fatal to him unless the writ sought for is issued by this Court.

In fact, the principle of finality is judge-made law which therefore violates the doctrine of separation of powers. It eviscerates the intent of jurisdictional statutes 28 USC 1338, 28 USC 1331, 28 USC 1343, 28 USC 1334, 28 USC 157(b)(2)(B),(C),(H), 11 USC 544(b); Civil Rules 12(h)(3) and 54(b); judgement lien statute 28 USC 1962; and patent statute 35 USC 261 because it permits courts to "implicitly resolve" what these statutes explicitly require of every judgement.

Judge-made law tells us that the principle of finality must be balanced against the principle of validity. Thus, if a jud-

gement is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgement remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised. Judge-made law suggests that the problem is one of selecting which of the two principles is to be given greater emphasis. See *Restatement (Second) of Judgements* 12 *Comment a.* However, the principle of finality itself rests on the premise that a court must have jurisdiction of the subject matter i.e., a judgement does not become final until the jurisdictional statutes and Civil Rule 54(b) are met. As things now stand, courts are permitted to decide cases on issues of defense and then say that their jurisdiction is "implicitly resolved". In this modern approach, the burden is on the parties to raise the issue or waive it contrary to the express language of Civil Rule 12(h)(3), a warning to judges that their judgements will be indefinitely open to attack unless they follow the jurisdictional statues.

The principle of finality is based on the *Chicot County* case. This Court, speaking through Justice Joseph Story, affirmed explicitly, following Blackstone, that court decisions are not "laws" because the judicial power is not a law-making power, only a power to apply the law so as to do justice in the particular case. *Swift v. Tyson* (1842) 41 US 1-24. In contrast, the principle of validity is based on the jurisdictional statutes and Civil Rule 54(b) for final judgements. The *Chicot County* case holding that a party who does not actually contest the court's subject matter jurisdiction also will be bound by the judgement sould be overruled.

There is a strong public policy interest in the principle of validity of judgements. This public policy is expressed in jurisdictional statutes 28 USC 1338, 28 USC 1331, 28 USC 1343, 28 USC 1334, 28 USC 157(b)(2) (B),(C),(H), 11 USC 544(b); Civil Rules 12(h)(3) and 54(b); judgement lien statute 28 USC 1962; and patent statute 35 USC 261. There is no comparable statutory expression of a public policy interest for the principle of finality of judgements. This disparity counsels against permitting the principle of finality to compromise the principle of validity.

D. Constitutional Rights

Freedom of speech[6] is not beyond control. *Schenck v. United States* (1919) 249 US 47 (clear and present danger test); *Schaefer v. United States* (1920) 251 US 466 (bad tendency test); *Dennis v. United States* (1951) 341 US 494 (clear and probable danger test); *Barenblatt v. United* (1959) 360 US 109 (balancing test). The issue at bar is whether debtor's filings warrant control under any one of these tests. Since the order to show cause asserts a right to conserve the court's resources, the balancing test is relevant here. This test requires that when the interests and rights of both individuals and the government are at stake, the more necessary right gets the weight.

By its repeated refusals to actually litigate and expressly determine the issue of lack of jurisdiction of the subject matter

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[6] Similar arguments can be made for the right to petition government and due process.

raised by the debtor, the Court of Appeals appears more concerned with the suppression of debtor's views and opinions on the issue than it is with its responsibility to conserve its resources. The court's resources could have been conserved had it resolved the issue of its jurisdiction raised in debtor's first appeal. While constitutional guarantees of individual rights do not include the right to consume the court's resources they do include the right to a fair trial and to be heard on all claims of a complaint or motion, including claims for lack of jurisdiction.

Moreover, the pre-filing order implies the proposition that conservation of the court's resources will benefit other litigants more deserving than debtor and thus is a strong right which must be balanced against debtor's constitutional rights. This view ignores the quality of justice being dispensed by the court. If the quality of justice is zero, as it is in the present case, no litigant will benefit and debtor's constitutional rights are zero. All governments, including authoritarian ones, claim a right to conserve their resources. Free governments are distinguished because they base their rights on the quality of justice they dispense. Without justice, the emperor has no clothes. Nowdays, it is well known that the American legal system is extremely inefficient and that the chance of a deserving plaintiff's prevailing in the justice system is considerably less than the odds of flipping a coin[7]. This general result is supported in the in-

[7] The breakdown in the legal system is chronicled in a number of publications, too numerous to cite here. For example, see remarks by ex vice-president Dan Quayle "fewer than 8% of the lawsuits filed make it to trial ... the current system is a lottery that takes 5 or 10 years ... costs too much to resolve disputes in our legal system". *Wall Street Journal*, 27 May, 1993.

stant case by nine appeals all of which the court refused to actually litigate and expressly determine the questions of jurisdiction of the subject matter, even though it was the court's duty to do so[8]. Accordingly, the court's right to conserve its resources is a transparent one that does not rise to constitutional dimension. Debtor's right therefore to be heard on his claims outweighs the court's right to conserve its resources.

CONCLUSION

Wherefore, petitioner prays that this Court issue a writ of prohibition/ mandamus to said Court directing it to stay its prefiling order and to decide the issues of its jurisdiction raised by the petitioner in the nine appeals filed therein. Or, this Court should decide the questions presented by the petitioner. Petitioner further prays that this Court grant petitioner such other and further relief as it may deem to be just and equitable.

Dated: January 11, 1995

Respectfully submitted

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[8] Debtor's ordeal in the legal system began in 1985 when he filed a suit against creditors for patent infringement.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(filed 20 October,1994)

In re: JAMES CONSTANT,	)	No. 94-80318
	)	
Respondent.	)	ORDER
	)	

Before: BROWNING, FARRIS and LEAVY, Circuit Judges

On September 28, 1994, this court issued an order directing respondent James Constant to respond and show cause why this court should not enter the following pre-filing review order. This court has reviewed and considered the response to the order to show cause, and hereby enters the following pre-filing review order.

Respondent's failure to comply with the order shall result in any new appeal(s) he seeks to file being dismissed or not being filed and other sanctions being levied against respondent, such as a monetary judgement or a judgement of contempt, as the court may deem appropriate. The Clerk shall accept no further filings in this closed docket.

Pre-Filing Review Order

1. This pre-filing review order shall apply to all notices of appeal and petitions for extraordinary writs filed by respondent, in whole or in part, if he proceeds pro se. This order shall not apply to appeals or petitions in which respondent has coun-

sel or where the district court has certified in its order that the appeal or petition is not frivolous. Should respondent fail to comply with any of the provisions of this pre-filing review order, the Clerk shall not file the document and shall return the document to respondent, informing him of the deficiencies and granting him 14 days to correct the deficiency.

2. Each notice of appeal or petition filed by respondent shall comply with the requirements of the Ninth Circuit Rules and the Federal Rules of Civil and Appellate Procedure, especially Federal Rule of Civil Procedure 54(b) and Federal Rule of Appellate Procedure 4(a), and shall contain the following sentence in capital letters "THIS NOTICE OF APPEAL/PETITION IS FILED SUBJECT TO PRE-FILING REVIEW ORDER No. 94-80318" in the body of the notice of appeal or petition.

3. Each of respondent's future notices of appeal and petitions shall include a copy of the order(s) of the district court from which he is appealing, a short and plain statement of the facts or law on which he will rely for the purposes of the appeal, and a statement that he has not previously appealed this order or raised this issue in a prior appeal or petition.

4. If respondent's future notices of appeal and petitions are submitted in compliance with this order, the Clerk shall lodge the notice of appeal or petition and accompanying documents. The Clerk shall not file the appeal or petition or establish a presumptive schedule for the certificate of record, briefing, or transcripts except upon further order of the court.

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: JAMES CONSTANT,	)	No. 94-80318
	)	
Respondent.	)	
	)	RESPONSE

Before: Peter L. Shaw,
Appellate Commissioner

RESPONSE TO ORDER TO SHOW CAUSE

As a first showing of cause, the Court's proposed injunction to require the respondent to have a lawyer violates respondent's First Amendment right to petition the Court. As officers of the Court, no lawyer will risk his practice before the Court to argue, as respondent does, that federal judges make judgements through fraud in the administration of justice, without jurisdiction, and in violation of respondent's constitutional rights.

As a second showing of cause, more fully detailed in the cases at bar, the Court's judgements were obtained through fraud in the administration of justice, without jurisdiction, and in violation of respondent's constitutional rights. Respondent's claims in cases at bar were never reached on the merits and all cases were decided on issues of affirmative defenses and procedure. A court's jurisdiction rests on claims of the complaint(s) not on issues of defense or procedure. *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811.

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As a third showing of cause, more fully detailed in the cases at bar and hereinbelow, the Court lacks jurisdiction of the subject matter in each case at bar. Judges who decide cases in the clear absence of jurisdiction violate their oaths of office and are liable under the criminal laws. The Court's proposed injunction appears to be an attempt to silence the respondent for having brought suits against judges of this circuit claiming fraud in the procurement of judgements, lack of jurisdiction, and violations of constitutional rights. See Appeal Nos 92-55891, 92-56045, and 92-55995.

STATUTORY PROVISIONS INVOLVED

Jurisdictional statutes 28 USC 1334, 28 USC 157(b)(2)(B),(C),(H); 11 USC 544(b); Civil Rule 12(h)(3); judgement lien statute 28 USC 1962; and patent statute 35 USC 261 are set forth in APPENDIX A.

STATEMENT OF THE CASE

Respondent initiated the stated appeals as a debtor in his bankruptcy case. Before the petition for bankruptcy was filed, debtor was the owner of 8 patents and debtor had assigned 22 patents to his wife pursuant to patent statute 35 USC 261 governing the assignment of United States Patents and voidance thereof. Three of debtor's patents were found invalid by the district court (hereafter "pre-petition cases") and unsecured creditors obtained a pre-petition judgement lien against the debtor pursuant to 28 USC 1962 and demanded debtor's patents, his only assets, as payment. Debtor filed for bankruptcy and filed the actions at bar. Debtor's 8 patents were abandoned

to debtor by the bankruptcy court as having no value. In the district court, unsecured creditors obtained a post-petition judgement lien against debtor and demanded debtor's patents as payment, and the district court assigned debtor's 8 patents to the U.S. Marshall under California state laws. The bankruptcy trustee brought suit against debtor's wife to recover wife's patents; and the bankruptcy court voided the assignment and assigned wife's 22 patents to the bankruptcy trustee under California state laws. On appeals, this Court affirmed.

In the courts below and in this Court, debtor argued that the courts lacked jurisdiction, **first**, to decide pre-petition cases and cases at bar on creditor's affirmative defenses, **second**, to assign debtor's patents to the U.S. Marshall under California state laws, **third**, to void the assignment of wife's patents and to assign wife's patents to the trustee under California state laws and, **fourth**, that judgement lien statute 28 USC 1962 does not apply to patents and thus bars pre-petition judgement lien creditors (and the trustee who fills their shoes under 11 USC 544(b)) from bringing suit in California to assign and to void the assignment of United States patents by operation of California state laws.

In debtor's cases[1], the bankruptcy court had jurisdiction pursuant to 28 USC 1334 [Bankruptcy Cases and Proceedings], and 28 USC 157(b)(2)(B) and (C) [Allowance or

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[1] Appeal Nos 92-55465, 92-56220, 92-56475, 92-55891, 92-56045, 92-55995 (hereafter "debtor's cases").

dissallowance of claims against the estate; counterclaims by the estate]. As argued by debtor, **first**, the Supreme Court has ruled that courts lack jurisdiction to decide claims of complaints on issues of affirmative defense (patent invalidity in pre-petition cases; res judicata in debtor's cases). *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811, **second**, that patent statute 35 USC 261 bars the jurisdiction of a court to assign debtor's patents to a U.S. Marshall by operation of California state law and, **third**, judgement lien statute 28 USC 1962 does not apply to patents and thus bars the jurisdiction of a court to hear a suit by unsecured creditors to assign debtor's patents in California. See Appeal No. 92-56475.

In wife's cases[2], the bankruptcy court had jurisdiction pursuant to 28 USC 1334 [Bankruptcy Cases and Proceedings], 28 USC 157(b)(2)(H) [Proceedings to Determine, Avoid, or Recover Fraudulent Conveyances], and 11 USC 544 [trustee may avoid transfer of property]. The trustee's action was brought under 11 USC 544(b) which provides that the trustee may avoid any transfer by debtor "that is voidable under applicable law"[3]. As argued by the debtor, **first**, the applicable non-bankruptcy law under 11 USC 544(b) is federal patent statute 35 USC 261 governing the assignment and the voiding of assignment of United States patents, **second**, that patent statute 35 USC 261 bars the jurisdiction of a court to void the assignment of wife's

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[2] Appeal Nos 93-56266, 94-55053 (hereafter "wife's cases").

[3] Subsection 544(b) limits the trustee to the rights of actual unsecured creditors to void transfers "under applicable law".

United States patents and to assign wife's patents by operation of California State law, **third**, that California state laws Cal. Codes 3439.04 and 3439.05 are inapplicable under 11 USC 544(b) because the voiding of assignment of United States patents is governed by patent statute 35 USC 261 and, **fourth**, judgement lien statute 28 USC 1962 does not apply to patents and thus bars the jurisdiction of a court to hear a suit by unsecured creditors (and the trustee) to void the assignment of and to assign wife's United States patents in California.

This Court failed to consider the issues of jurisdiction raised by debtor and affirmed solely on issues based on affirmative defenses (Appeal Nos 92-55465, 92-56-220, 92-55891, 92-56045, 92-55995), California state laws (Appeal No 92-56475), and issues of procedure (wife's cases).

REASONS FOR CONSIDERING THE ISSUES OF JURISDICTION RAISED BY THE DEBTOR

This Court's assumption of jurisdiction in the cases at bar, without determination of issues on jurisdiction raised by debtor, conflicts with previous decisions of the Supreme Court, with the decisions of other Circuits, and with decisions of this Court and courts in this Circuit.

The following points of law raised by debtor were not determined by the Court:

1. Whether Civil Rule 12(h)(3) requires a court to determine the jurisdictional issue raised by the debtor.

2. Whether courts lack jurisdiction to invalidate debtor's pre-petition patents on the issue of defense of patent invalidity and to decide debtor's cases on the issue of defense of res judicata. *Christiansen, supra.*

3. Whether patent statute 35 USC 261 bars the jurisdiction of a court to assign debtor's United States patents to a U.S. Marshall by operation of California state law.

4. Whether California state law Calif. Code 695.010 applies to debtor's patents for the enforcement of creditor's post-petition money judgement.

5. Whether federal patent statute 35 USC 261 is the applicable non-bankruptcy law to void the assignment of United States patents under 11 USC 544(b).

6. Whether patent statute 35 USC 261 bars the jurisdiction of a court to void the assignment of wife's patents and to assign wife's patents by operation of California state law.

7. Whether Cal. Code 3409.04 and 3409.05 are inapplicable under 11 USC 544(b) to void the transfer of United States patents.

8. Whether judgement lien statute 28 USC 1962 bars pre-petition judgement lien creditors (and the trustee who fills their shoes) from bringing suit in California to assign debtor's United States patents and to void and to assign wife's United states Patents.

A. *Civil Rule 12(h)(3) Requires That A Court Must Decide A Question Of Jurisdiction Before It*

Civil Rule 12(h)(3) permits raising a jurisdictional question at any time by suggestion of a party or non-party.

If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue. See numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2. A party may always suggest that the court lacks jurisdiction. *Moore's Federal Practice 2d ed. 1994* 12-237 n.21. The court at any stage of the proceedings has a duty to raise such a defect on its own initiative. *Id* 12-239 n.23. Challenges to jurisdiction may be brought to the court's attention by persons other than parties to the action. *New York, v. Waterfront Airways, Inc.* (SD NY 1985) 620 F Supp 411. The question whether or not there is subject matter jurisdiction is open to challenge at any time and at any level of adjudication. *Sadat v. Mertes* (CA7 1980) 615 F2d 1176, 54 ALR Fed 401. Subject matter jurisdiction can be challenged even after judgement. *Eisler v. Stritzler* (CA1 1976) 535 F2d 148, 21 FR Serv2d 1380; *Alexander v. Allister* (ND Ill 1976) 424 F Supp 277. An appellate court can consider the question of lack of subject matter jurisdiction even on its own motion and even where the issue was not raised in the district court. *Wymard v. McCloskey & Co.* (CA3 1965) 342 F2d 495 *cert. den.* 382 US 823, 15 LEd2d 68, 86 SCt 52; *Rice v. Rice Foundation* (CA7 1979) 610 F2d 471; *Velez v. Crown Life Ins. Co.* (CA1 1979) 599 F2d 471. Even the Supreme Court will raise lack of jurisdiction of the

subject matter on its own motion when the case reaches that late stage. *Louisville & N.R.Co. v. Mottley* (1908) 211 US 149, 53 LEd 126, 29 SCt 42.

Where there is no subject matter jurisdiction, a court has no discretion to ignore lack of jurisdiction. *Joyce v. United States (CA3 1973)* 474 F2d 215; *International Video Corp. v. Ampex Corp.* (CA9 1973) 484 F2d 634, 179 USPQ 260, 17 FR Serv2d 1240. A court lacking subject matter jurisdiction cannot render judgement, but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking. *Basso v. Utah Power & Light Co.* (CA10 1974) 495 F2d 906, 18 FR Serv2d 937.

The Court's decisions at bar were made without an inquiry into the questions of subject matter jurisdiction under *Christiansen, supra*, patent statute 35 USC 261, and judgement lien statute 28 USC 1962 raised by the debtor. See the specific points of law 1-8 raised by debtor, *supra*.

B. ***The Court Lacks Jurisdiction To Decide Debtor's Cases On Affirmative Defenses of Patent Invalidity And Res Judicata***

In *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811 the Court held that a patent law defense of patent validity is not a claim (cause of action) for purposes of jurisdiction under 28 USC 1338. The Court also held that a defense or procedure is not a claim under 28 USC 1331 and 28 USC 1343. As alleged in debtor's cases, pre-petition cases were decided on issues of defenses without jurisdiction of the subject matter.

In debtor's cases, the district court's jurisdiction is under 28 USC 1334, 28 USC 157(b)(2)(B) [allowance or dissallowance of claims] and (C) [counterclaims against persons filing claims against the estate]. There is nothing in the record of debtor's cases that shows that creditor's claims were judicially determined as allowed or dissallowed or that petitioner's counterclaims against creditor's claims were adjudicated on the actual merits. Debtor's cases were decided on issues of defense (res judicata) without jurisdiction of the subject matter[4].

C. *Patent Statute 35 USC 261 Bars The Jurisdiction of A Court To Assign Patents Or To Void The Assignment of United States Patents By Operation Of California State Law*

Re Peregrine (Bkrtcy. CD Cal 1990) 116 BR 194,205 footnote 16 held that "while it appears that in California a judicial lien may, in fact, be used to encumber a copyright [or patent], that is only half the task; the court must also determine whether federal law insulates copyrights [or patents] from attachment by state court procedures". As to patents, state law is limited to determining the relative rights of creditors and patent exemptions. *Re Transportation Design* (BC SD Cal. 1985) 48 BR 635,639-40.

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[4] The Court's repeated acts without jurisdiction point to gross incompetence or willfull suppression in the cases at bar. Debtor's opinion is that the Court willfully suppressed the cases at bar to cover up debtor's claims of fraud in the procurement of judgements, lack of jurisdiction, and constitutional violations by federal judges named as defendants in debtor's cases.

State law may not nullify the patent laws of Congress regulating their transfer. *Allen v. Riley* (1906) 203 US 347. Federal regulation under 35 USC 261 preempts state law. *Re Peregrine* (Bkrtcy. CD Cal 1990) 116 BR 194,206 footnote 17. Where federal law excludes state law, the court must apply the federal law. *Re Velikoplejki* (BC SD Fla 1985) 54 BR 534,538; *Re Transportation Design* (BC SD Cal 1985) 48 BR 635,639-40; *Unarco Industries, Inc. v. Kelley Co.* (CA7 1972) 465 F2d 1302,1305-06.

Patent statute 35 USC 261 governs the assignment and voidance of assignment of patents. Questions of patent assignments arise under the patent laws. *Crown Die & Tool Co. v. Nye Tool & Machine Works* (1923) 261 US 24, 67 LEd 516, 43 SCt 254; SCt background *US LEd Digest* Courts 291; *Geni-Chlor Int'l, Inc. v. Multisonics Dev. Corp.* (CA9 1978) 580 F2d 981, 200 USPQ 67.

In *Re Peregrine* (Bkrtcy. CD Cal 1990) 116 BR 194 the court was faced with the same issue which is now before this Court, i.e., should a creditor have the status of a bona fide purchaser, rather than that of a judicial lien creditor. Creditor Cap Fed argued that the term transfer in section 205(d) of the Copyright Act refers only to consensual transfers. The court rejected this argument

> "The Copyright Act's definition of transfer is very broad and specifically includes transfers by operation of law. 17 USC 201(d)(1). The term is broad enough to encompass not merely purchasers but lien creditors as well." *Id* 206.

However, in footnote 17, the court distinguished the Patent Act

> "Unlike 17 USC 205(d), the priority scheme created under the Patent Act specifically applies only to subsequent purchasers and mortgagees. 35 USC 261. Lien creditors are neither." *Id* 206 footnote 17.

The court held that Cap Feds earlier prepetition unperfected security interest in NPI's **copyrights** is trumped by NPI's hypothetical judicial lien. *Id* 207.

Debtor's and wife's ownership of **patents** trumps the creditor's unsecured and unperfectable claim. Creditors are not secured creditors that could have perfected their security interests by filing in the Patent Office. Unsecured, unperfected interests have no claim to title under 35 USC 261. *Id* 206 footnote 17. Under 35 USC 261 the creditor must have the status of a bona fide purchaser, rather than that of unsecured creditor since 35 USC 261 refers only to consensual transfers.

Judgement lien creditors are not purchasers or mortgagees under 35 USC 261. *Re Peregrine* (Bkrtcy. CD Cal 1990) 116 BR 194,206 footnote 17. A judgement lien creditor is not a

bona fide purchaser. *Re Mellor* (CA9 1984) 734 F2d 1396, 1941. Accordingly, creditors (and the trustee who fills their shoes) are not entitled to file their pre-petition judgement lien in the Patent Office to assign debtor's patents and to void the assignment of and to assign wife's patents under 35 USC 261. Nor does the trustee have rights under 11 USC 544(b) superior to those of unsecured creditors. Creditors, by bringing their motion to assign debtor's patents (Appeal No. 92-56475), and the trustee, by bringing its suit to assign wife's patents (wife's cases) have obtained rights not otherwise available to creditors or the trustee under patent statute 35 USC 261.

D. *Judgement Lien Statute 28 USC 1962 Bars The Jurisdiction Of A Court To Hear A Suit To Assign Patents Or to Void The Assignment of United States Patents By Operation Of California State Law*

Nor are creditor's pre-petition and post-petition judgements a lien under 28 USC 1962 that would entitle them (and the trustee who fills their shoes) to bring suits against debtor and wife because patents have no situs for jurisdictional purposes. "Intellectual property, such as patents, is the most intangible form of property", *Filmtec Corp. v. Allied Signal, Inc.* (CAFC 1991) 939 F2d 1568, 1570 n.5, "with no situs for jurisdictional purposes", see *4 Wright & Miller, Federal Practice and Procedure* 1071, at 429-30 (1987) (rule that jurisdiction can be based on location of property "obviously has no relevance when the debt or obligation is not embodied in a writing at all, as is true of patents").

Thus, creditors are not even lienholders under 28 USC 1962 because their claims based on their pre-bankruptcy and post-bankruptcy judgement liens do not apply to patents. Accordingly, creditors (and the trustee who fills their shoes) are not entitled to file their judgement liens in a court to assign debtor's patents and to void the assignment of and to assign wife's patents by operation of California state law. Nor does the trustee have rights under 11 USC 544(b) superior to those of unsecured creditors. By bringing their suit to assign debtor's and wife's patents under California law, the creditors and the trustee have obtained rights not otherwise available to creditors under judgement lien statute 28 USC 1962.

E. *Conflicts Of Decisions On Jurisdiction*

(a) *Courts Must Decide Questions On Jurisdiction Before Them*

The Court's affirming of decisions at bar were made without an inquiry into the questions of subject matter jurisdiction under *Christiansen, supra*, patent statute 35 USC 261, and judgement lien statute 28 USC 1962 raised by the debtor. See the specific points of law 1-8 raised by debtor, *supra*. This is contrary to decisions on jurisdiction of the Supreme Court and other Circuits. See citations in Part A *supra*. The Court should determine the issue of its jurisdiction in light of Civil Rule 12(h)(3), **first**, to resolve the conflicts created by the Court's assumption of jurisdiction and the numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2 (courts lack discretion to ignore questions of juris-

diction of subject matter under Civil Rule 12(h)(3)), **second**, to explicitly rule that courts must decide questions of jurisdiction brought to their attention by parties or otherwise and, **third**, to resolve the conflicts created by the Court's assumption of jurisdiction and the decisions in *Moore's Federal Practice 2d ed. 1994* 12-237 n.21 (a party may always suggest that the court lacks jurisdiction) and 12-239 n.23 (court at any stage of the proceedings has a duty to raise such a defect on its own initiative); in the decision of *New York, v. Waterfront Airways, Inc., supra,* (challenges to jurisdiction may be brought to the court's attention by persons other than parties to the action); in the decision of *Sadat v. Mertes, supra,* (the question whether or not there is subject matter jurisdiction is open to challenge at any time and at any level of adjudication); in the decisions of *Eisler v. Stritzler, supra*; *Alexander v. Allister, supra,* (subject matter jurisdiction can be challenged even after judgement); in the decisions of *Wymard v. McCloskey & Co., supra*; *Rice v. Rice Foundation, supra*; *Velez v. Crown Life Ins. Co., supra,* (an appellate court can consider the question of lack of subject matter jurisdiction even on its own motion and even where the issue was not raised in the district court; in the decision of the Supreme Court in *Louisville & N.R. Co. v. Mottley, supra,* (even the Supreme Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage); in the decisions of *Joyce v. United States, supra*; *International Video Corp. v. Ampex Corp., supra,* (where there is no subject matter jurisdiction, a court has no discretion to ignore lack of jurisdiction) and in the decision in *Basso v. Utah Power & Light Co., supra,* (a court lacking subject mat-

ter jurisdiction cannot render judgement, but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking).

(b) ***Courts Lack Jurisdiction To Decide Debtor's Cases On Affirmative Defenses of Patent Invalidity And Res Judicata***

The Court relies on issues of defense (patent invalidity and res judicata) for the implied proposition that it has jurisdiction to decide debtor's cases. See Appeal No. 92-55465. This is contrary to the Supreme Court's decision. See Part B, *supra*. The Court should determine the issue of its jurisdiction, **first,** in light of *Christiansen*, *supra* (courts lack jurisdiction to decide claims on issues of affirmative defense) and, **second,** to explicitly rule that affirmative defenses are not claims for purposes of a court's jurisdiction.

(c) ***Courts Lack Jurisdiction To Assign Patents And To Void The Assignment of United States Patents By Operation Of California State Law***

The Court relies on Cal. Code 695.010 for the implied proposition that it has jurisdiction to decide debtor's case Appeal No. 92-56475. And, the Court relies on Cal. Codes 3409.04 and 3439.05 for the implied proposition that it has jurisdiction to void the assignment of and to assign wife's patents under state laws. This is contrary to decisions on jurisdiction of the Supreme Court, other Circuits, and courts in this circuit. See citations in Part C *supra*. The Court should determine its jurisdiction in light of patent statute 35 USC 261, **first,** to resolve the conflicts created by the

Court's decisions on jurisdiction and the Supreme Court's decision in *Allen v. Riley, supra* (state law may not nullify the patent laws of Congress regulating their transfer); and the Supreme Court's decisions in *Crown Die & Tool, supra*, and in *US LEd Digest* Courts 291, *supra,* (questions of patent assignments arise under the patent laws), **second**, to explicitly rule that patent statute 35 USC 261 bars the jurisdiction of a court to assign and to void the assignment of United States patents by operation of state law, **third**, to resolve the conflicts created by the Court's decisions on jurisdiction and the Seventh Circuit decision in *Unarco Industries, supra* (where federal law excludes state law, the court must apply the federal law) and, **fourth**, to resolve the conflicts created by the Court's assumption of jurisdiction and this Court's decisions in *Geni-Chlor, supra* (questions of patent assignment arise under the patent laws) and in *Re Mellor, supra* (a judgement lien creditor is not a bona fide purchaser), and the decisions of courts in this circuit in *Re Peregrine, supra* 205 footnote 16 (court must determine if federal law insulates patents), 206 footnote 17 (judgement lien creditors are not purchasers or mortgagees under 35 USC 261), and *Re Transportation Design, supra* at 639-640 (state law is limited to determining the relative rights of creditors and patent exemptions).

(d) *Courts Lack Jurisdiction To Hear Suits To Assign Patents And To Void The Assignment of United States Patents By Operation Of California State Law*

The Court relies on Cal. Code 695.010 for the implied proposition that judgement lien statute 28 USC 1962 permits

the courts to hear suits by creditors with pre-petition and post-petition judgement liens to assign debtor's patents in Appeal No. 92-56475. And the Court relies on Cal. Codes 3409.04 and 3439.05 for the implied proposition that judgement lien statute 28 USC 1962 permits the courts to hear suits by creditors (or the trustee who fills their shoes) to void the assignment of and to assign wife's patents. This is contrary to decisions of other Circuits. See citations in Part D *supra*. This Court should determine its jurisdiction in light of judgement lien statute 28 USC 1962, **first**, to resolve the conflicts created by the Court's assumption of jurisdiction and the decision in the Federal Circuit in *Filmtec, supra* and in the decisions in *4 Wright & Miller, Federal Practice and Procedure* 1071 at 429-30 (1987) (patents have no situs for jurisdictional purposes) and, **second**, to explicitly rule that judgement lien statute 28 USC 1962 bars the jurisdiction of a court to hear suits to assign patents and to void the assignment of United States Patents by operation of California state law.

CONCLUSION

The Court must decide the specific questions of its jurisdiction of subject matter raised by the debtor in light of Civil Rule 12(h)(3), *Christiansen, supra*, patent statute 35 USC 261, and judgement lien statute 28 USC 1962, see Part E, *supra*, before it attempts to issue the proposed unconstitutional injunction.

If the Court decides it lacks jurisdiction in the cases at bar, the judges who have tried these cases may be liable to the debtor for having acted without jurisdiction of the subject matter.

The judges who have tried the cases at bar shall disqualify themselves from deciding the issues showing cause above, as their impartiality might reasonably be questioned. 28 USC 455(a).

dated: 4 October, 1994

Respectfully submitted

James Constant
Respondent

APPENDIX

28 USC 1334 Bankruptcy Cases And Proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have jurisdiction of all cases under title 11.

28 USC 157(b)(2) Procedures

(B) allowance or dissallowance of claims against the estate ..

(C) counterclaims by the estate against persons filing claims against the estate.

(H) proceedings to determine, avoid, or recover fraudulent conveyances.

11 USC 544(b)

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title.

Civil Rule 12(h)(3):

Whenever it appears by **suggestion** of the parties **or otherwise** that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

28 USC 1962 Lien

Every judgement rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgement of a court of general jurisdiction in such State .....

35 USC 261 Ownership; Assignment

..... patents, or any interest therein, shall be assignable in law by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may in like manner grant and convey an exclusive right under his ... patents, ... An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subsequent purchase or mortgage.

HISTORY OF APPEALS INITIATED BY PETITIONER

I. DEBTOR'S CASE (INITIATED BY PETITIONER)

Appeals 92-55465, 92-56220, 92-56475, 92-70072 (Consolidated Appeals Opinion)

92-55465. Debtor's Objections to Creditor's Claims Based On Void Judgements Obtained Through Fraud. The Bankruptcy Court Had Jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(B) and (C). The Court of Appeals affirmed the District Court's dismissal of the complaint on grounds of res judicata.

92-56220. Debtor's Opposition to Rule 11 Sanctions Request by creditors. The Court of Appeals affirmed the District Court's award of sanctions under Rule 11.

92-56475. Debtor's Opposition to the enforcement of creditor's money judgement under California State laws. The Court of Appeals affirmed the District Court's authority to enforce a money judgement against United States Patents under California State laws.

92-70072. Petition for Rehearing Appeal Nos. 92-55465, 92-56220,92-56475 And Suggestion That Case Be Heard In Banc. The Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing en banc.

Adverse Parties In Appeal NOS.92-55465, 92-56220, 92-56475 (Creditors)

Corporations: Advanced Micro-Devices, Inc.; AT&T Paradyne; Fujitsu, Ltd; Fujitsu Microelectronics; FPS, Inc.;

American Telephone & Telegraph; Hitachi America, Inc.; Analog Devices, Inc.; NEC Electronics, Inc.; Intel Corp.; American Microsystems, Inc.; Gould, Inc.; Texas Instruments, Inc.; Digital Switch, Inc.; Granger Associates, Inc.; Rockwell International, Inc.; TRW, Inc.

Attorney firms: Kane, Dalsimer, Sullivan, Kurucz, Levy, Eisele & Richard; Skjerven, Morrill, MacPherson, Franklin & Friel; Morrison & Foerster; Limbach & Sutton; Sheppard, Mullin, Richter & Hampton; Baker, Mills & Glast; Acker, Underwood & Smith; Fullbright & Jaworski; Spensley, Horn, Jubas & Lubitz; Pretty, Schroeder, Brueggeman & Clark; Hopgoode, Calimafde, Kalil, Blaustein & Judlowe; Blakely, Sokoloff, Taylor & Zafman; Brown & Bain; Romney, Golant, Marten & Ashen; Grossman, Graven, Perry & Block; Munger, Tolles & Olson; White & Durkee; Saltzburg, Ray & Bergman.

Attorneys: Kristin M. Cano; Jonathan R. Ellowitz; Anthony De Alcuaz; Paul Malingagio.

Marcel Hoff, an individual; and
David L. Ray, Bankruptcy Trustee.

Appeals 92-55891, 92-56045, 92-55995
(Consolidated Appeals Opinion)

92-55891. Debtor's Objections to Creditor's Claims Based On Void Judgements Obtained Through Fraud. The Bankruptcy Court Had Jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(B) and (C).

92-56045. Debtor's Declaratory Judgements That Statutes

28 USC 2072,331,137, Civil Rules 11,12(b),41(b),56 and General Order 224[1] Are Unconstitutional. The Bankruptcy Court had jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(B) and (C).

92-55995. Deprivation of Debtor's Legal And Constitutional Rights, Conspiracy To Obstruct Justice And To Deprive Privileges And Immunities, Neglect To Prevent Conspiracy, And Void Judgements. The District Court had Jurisdiction pursuant to 28 USC 1331 and 28 USC 1343(a)(1) and (2).

The Court of Appeals affirmed the District Court's dismissal of the 3 complaints on grounds of absolute judicial immunity.

Adverse parties in Appeal NOS. 92-55891, 92-56045, 92-55995 (Judges)

Ninth Circuit District Judges: Stephen V. Wilson, Manual Real, Robert P. Aguilar;

Federal Circuit Appeals Judges: Oscar Davis, Wilson Cowen, Edward Smith, Helen Nies, Pauline Newman, Howard Markey, Paul Michel; and UNITED STATES OF AMERICA.

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[1] Cited statutes were used by courts to gain jurisdiction to dismiss prepetition cases and to sanction debtor.

II. WIFE'S CASE (INITIATED BY BANKRUPTCY TRUSTEE AGAINST DEBTOR'S WIFE)

93-56266. Debtor's Motion To Intervene In Adversary Proceeding By The Trustee Against Debtor's Wife. The Bankruptcy Court had jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(H).

94-55053. Debtor's appeal from an order of the Bankruptcy Court transferring 22 United States Patents from debtor's wife to the bankruptcy trustee[2].

The Court of Appeals affirmed the District Court's dismissal of both appeals on grounds debtor has no standing to appeal.

Adverse Party In Wife's Case:

David L. Ray, Bankruptcy Trustee.

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[2] Petitions for certiorari in the underlying appeals have been denied by this Court except for the Petition for Certiorari in underlying Appeal No. 94-55053 which is pending in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I United States Constitution

Congress shall make no law ... abridging the freedom of speech ... or the right to petition the government for a redress of grievances.

Amendment V United States Constitution

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 USC 1338 Patents

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents ...

28 USC 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 USC 1343 Civil Rights

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

28 USC 1334 Bankruptcy Cases And Proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have jurisdiction of all cases under title 11.

28 USC 157(b)(2) Procedures

(B) allowance or dissallowance of **claims** against the estate ..

(C) **counterclaims** by the estate against persons filing **claims** against the estate.

(H) proceedings to determine, avoid, or recover fraudulent conveyances.

11 USC 544(b)

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title.

Civil Rule 12 Non-Waiver of Jurisdiction of the Subject Matter

(h)(3) Whenever it appears by **suggestion** of the parties **or otherwise** that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Civil Rule 54 Judgement Upon Multiple Claims Or Involving Multiple Parties

(b) When more than one **claim** for relief is presented in an action, whether as a **claim, counterclaim, cross-claim,** or third-party **claim**, or when multiple parties are involved, the court may direct the entry of a final judgement as to one or more but fewer than all **claims** of the parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgement. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the **claims** or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the **claims** or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the **claims** and the rights and liabilities of the parties.

28 USC 1962 Lien

Every judgement rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgement of a court of general jurisdiction in such State .....

35 USC 261 Ownership; Assignment

..... patents, or any interest therein, shall be assignable in law by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may in like manner grant and convey an exclusive right under his ... patents, ... An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subsequent purchase or mortgage.

Supreme Court, U.S.
FILED
FEB 17 1995
OFFICE OF THE

No. 94-1257

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1994

In re: JAMES CONSTANT, *Petitioner*

On Petition for Extraordinary Writ to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Respondent Advanced Micro-Devices, Inc.[1] disagrees with the petitioner's statement of the questions presented.

1. Whether issuance of the pre-filing review order was an appropriate exercise of the inherent power of the Court of Appeals.

2. Whether this Court should employ the unusual and extraordinary remedy of a writ issued pursuant to 28 U.S.C. § 1651(a) to grant further appellate review of issues previously considered and decided by the Court of Appeals and as to which this Court has previously denied review.

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[1] Advanced Micro-Devices, Inc. has no parent company and no subsidiary that is not wholly owned.

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No. 94-1257

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1994

In re: JAMES CONSTANT, *Petitioner*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATUTES AND RULES

In addition to those statutes and rules cited by petitioners, the following statutes and rules are relevant in the case:

28 U.S.C. § 1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Rule 20.1 of the Rules of the Supreme Court of the United States:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651 (a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

I. Introduction

This proceeding is the latest in an incredible series of lawsuits, appeals and applications for review brought by petitioner James Constant. Most recently, by Order issued January 9, 1995, Mr. Constant's petition to this Court for certiorari in number 94-782 was denied. In 1993, petitioner sought review of another decision by the Ninth Circuit Court of Appeals, under docket 93-1518. That petition was denied by Order issued by this Court on May 16, 1994.

II. The Pre-Filing Review Order

The pre-filing review order which is the subject of this latest petition of Mr. Constant was issued by the Court of Appeals on October 20, 1994. The reasons for this order are readily apparent from the procedural history of Mr. Constant's vexatious litigation, which is set forth below. In petitioner's brief, he challenges not only the issuance of the order, but also the alleged failure of the Court of Appeals to decide petitioner's designated issues on the merits. *See* Petition 7. He also requests that this Court "determine the merits of the questions raised...." *Id.* 10. Thus, petitioner is again attempting to litigate issues previously considered and adjudged against him in earlier appeals.

III. Background Leading to Appeal to This Court in Cause Number 93-1518

Respondent Advanced Micro-Devices, along with Fujitsu Limited and Fujitsu Microelectronics, Inc. filed a brief in this Court in opposition to one of Mr. Constant's earlier petitions for writ of certiorari mentioned above, number 93-1518. That brief contains a comprehensive summary of petitioner's litigation activities which may be helpful to the Court, and for that purpose, it is set forth verbatim as follows.

"The history of this litigation began in January 1985 when petitioner filed an action in the United States District Court for the Central District of California against the corporate respondents and numerous other high-technology companies. *James Constant v. Advanced Micro-Devices, Inc., et al.,* Case No. 85-0262 SVW (C.D. Cal.) ("Patent Case I"). In that action, petitioner alleged infringement of two of petitioner's patents and also asserted other claims based upon the alleged unconstitutionality of 35 U.S.C. § 282, which authorizes federal courts to adjudicate the validity of patents. The District Court found § 282 to be constitutional and dismissed petitioner's claims unrelated to infringement. Then, in November 1987, the District Court (Judge Stephen V. Wilson presiding), after appointing and receiving recommendations from a special master, granted summary judgment that petitioner's patents at issue in the case were invalid. With this judgment, the District Court also awarded respondents their costs.

"Petitioner prosecuted two separate appeals of the District Court's judgment in Patent Case I to the United States Court of Appeals for the Federal Circuit. In each instance, the decisions of the District Court were affirmed. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir. 1988); *Constant v. Advanced Micro-Devices, Inc.*, 862 F.2d 320 (Fed. Cir. 1988) (mem.). In its published opinion on the first of these appeals, the Federal Circuit warned petitioner about his already established practice of repeatedly raising previously litigated issues, as follows:

> "In the past the appellant has repeatedly attempted to reassert or revive claims and theories after they have been properly dismissed with prejudice by the district court. Appellant is hereby cautioned that if he persists by trying to raise again the same issues that have been finally decided by the district court or by this court, he could be sanctioned under Fed.R.Civ.P. 11, Fed.R.App.P. 38, and the inherent power of the courts to sanction."

Constant, 848 F.2d at 1572.

"In response to the Federal Circuit decisions, petitioner filed two petitions for writ of certiorari. Both petitions were denied. *See Constant v. Advanced Micro-Devices, Inc.*, 488 U.S. 892, 109 S. Ct. 228 (1988); *Constant v. Advanced Micro-Devices, Inc.*, 490 U.S. 1007, 109 S. Ct. 1643 (1989).

"Dissatisfied with the rulings in Patent Case I invalidating his patents, petitioner filed four new lawsuits in the Central District of California in October and November 1987 naming as defendants, among others, Judge Wilson, the special master appointed by Judge Wilson, and several of the defendants and their attorneys in Patent Case I. *See Constant v. Hillman,* Case No. 87-06592 R; *Constant v. Hoff*, Case No. 87-06766 R; *Constant v. Hitachi America, Ltd.*, Case No. 87-07046 R; *Constant v. Wilson*, Case No. 87-07315 R (collectively, "the Fraud Cases"). In these lawsuits, petitioner sought to collaterally attack the judgment in Patent Case I by claiming that it had been procured through a conspiracy among the defendants, their attorneys, and the federal courts to defraud him. Petitioner also sought to relitigate various issues before the district court in Patent Case I, including whether the proceedings of the patent action violated his right to due process, the constitutionality of 35 U.S.C. § 282, and the constitutionality of summary judgments.

"The Fraud Cases came before Chief Judge Manuel Real, who dismissed the complaints against Judge Wilson and the special master on the grounds of judicial immunity and granted summary judgment as to all other defendants on the basis that the Fraud Cases were an improper collateral attack on the rulings in Patent Case I and that petitioner failed to raise any issue of extrinsic fraud. Judge Real also sanctioned petitioner under Rule 11 for filing frivolous lawsuits and awarded defendants their costs and attorneys fees.

"Petitioner appealed Judge Real's decisions to the Federal Circuit (Case Nos. 88-1195 to 88-1198), which affirmed the judgments in all respects. *See Constant v. Wilson, Constant v. Hillman, Constant v. Hitachi America, Ltd., Constant v. Hoff*, 856 F.2d 202 (Fed. Cir. 1988) (mem.). The Federal Circuit also levied its own sanctions against petitioner for filing a frivolous appeal and awarded costs and attorneys fees to defendants....

[Quotations from opinion omitted]

"Petitioner subsequently filed a petition for writ of certiorari as to the Fraud Cases. This petition was denied. *See Constant v. Hitachi*, 493 U.S. 936, 110 S. Ct. 330 (1989).

"In 1988, petitioner filed another patent infringement case (involving a different patent than those in Patent Case I) against many of the same defendants as in the earlier patent case. *See Constant v. Advanced Micro-Devices, Inc.*, Case No. 88-00784 SVW (C.D. Cal.) ("Patent Case II"). This action was dismissed with prejudice by Judge Wilson for petitioner's continued refusal to comply with a court order to replead his complaint. In dismissing the complaint, Judge Wilson explained "[t]hat the Court is aware that dismissal with prejudice is a severe sanction to impose on a pro se litigant. However .... [h]is pro se status will not shield him from the consequences which any federal litigant must face if he or she insists on pursuing a course of conduct which shows a complete lack of respect for the federal courts." *Constant v. Advanced Micro-Devices, Inc.*, No.

88-00784 SVW unpublished order at 6-7 (C.D Cal. Oct. 31, 1988).

"Petitioner appealed the dismissal in Patent Case II to the Court of Appeals for the Federal Circuit, which affirmed the dismissal and again sanctioned petitioner for "filing and maintaining this completely unfounded and vexatious appeal." *Constant v. Advanced Micro-Devices, Inc.*, No. 89-1222 unpublished memorandum decision at 3 (Fed. Cir. April 11, 1989); *see Constant v. Advanced Micro-Devices, Inc.*, 873 F.2d 1451 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for writ of certiorari as to the dismissal was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 814, 110 S. Ct. 62 (1989).

"Also in 1988, respondent Advanced Micro Devices, Inc. (AMD) was forced by petitioner's claims in Patent Case II to file an action against petitioner in the Northern District of California for a declaratory judgment that certain other of petitioner's patents were invalid and not infringed by AMD. *See Advanced Micro-Devices, Inc. v. Constant* No. C 88 20101 (N.D. Cal.) (the "DJ Case"). The District Court found on summary judgment that one of petitioner's patents was invalid and that two others were not infringed. Petitioner appealed this judgment to the Federal Circuit, which affirmed. *See Advanced Micro-Devices, Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989) (mem.). Petitioner's subsequent petition for a writ of certiorari was denied. *See Constant v. Advanced Micro-Devices, Inc.*, 493 U.S. 1057, 110 S. Ct. 868 (1990).

"Yet another action filed by petitioner in 1988, while petitioner's appeal in Patent Case I was pending, was a suit against the United States government in the United States Claims Court asserting that the United States Patent and Trademark Office had somehow breached "patent grant contracts" by issuing him patents that were found to be invalid. *See Constant v. United States*, No. 295-88 (C1. Ct. 1988) ("PTO Case"). The Claims Court dismissed this action, and petitioner appealed to the United States Court of Appeals for the Federal Circuit, which affirmed. *See Constant v. United States*, 861 F.2d 728 (Fed. Cir. 1988) (mem.), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789 (1989).

"Two years later, in August 1990, petitioner filed a motion for relief from the Claims Court's dismissal of his PTO Case. The Claims Court denied petitioner's motion, and petitioner appealed. The Federal Circuit once again affirmed the dismissal and once again sanctioned petitioner for filing a frivolous appeal, concluding that "[g]iven the number of actions he has filed and the frequency and persistence with which he continues to attempt to relitigate the same theories which have consistently and finally been rejected as meritless, the inescapable conclusion is that Mr. Constant 'is engaged in "recreational" litigation....'" *Constant v. United States*, 929 F.2d 654, 659 (Fed. Cir. 1991), *cert. denied*, 111 S. Ct. 2799 (1991). The Court of Appeals further directed the clerk of the court, "[i]n light of Constant's continuous abuse of the appellate process," "to accept for filing no motion, petition, pleading or other fileable paper from James Constant without an order of the court approving the filing." *Id.*

[The following passages, again quoting verbatim from the earlier brief, describe the specific litigation that gave rise to Mr. Constant's petition for certiorari in appeal number 93-1518.]

"In September 1989, petitioner filed a voluntary bankruptcy petition under Chapter 11 (later converted to Chapter 7) in the United States Bankruptcy Court for the Central District of California (*In re James Constant*, LA-89-19270 KL). Nearly all of the creditors' claims identified by petitioner in the bankruptcy petition consisted of claims, made by those defendants that petitioner had previously sued, for payment of the costs and sanctions imposed on him by the various district and appellate courts.

"In August 1991, in yet another attempt to relitigate his previously rejected claims of patent infringement, fraud, conspiracy, and other causes of action from Patent Cases I and II, the Fraud Cases, and the DJ Case, petitioner filed a complaint in the Bankruptcy Court against the defendants in the prior cases, their attorneys of record, and the bankruptcy trustee. This complaint began the present lawsuit from which petitioner now seeks certiorari. In this complaint, petitioner objected to the defendants' creditor claims on the grounds that they were based on "void judgments obtained through fraud" and rendered without subject matter jurisdiction or due process and sought to set aside all of the prior federal courts' "orders and judgments," to obtain money damages and injunctive relief for the purported injustice done to him in earlier actions, and to disbar the defendant attorneys.

[Petitioner's complaint was ultimately transferred to Chief Judge Real, who had heard the previous Fraud Cases. Petitioner then filed suit against Judge Real, accusing him of criminality and bias. Judge John G. Davies found no cause to disqualify Judge Real.]

"Respondent Fujitsu subsequently moved to dismiss petitioner's complaint with prejudice on the grounds that it was barred under the doctrine of res judicata and to enjoin petitioner from filing any further actions against the defendants without first obtaining the permission of the Court. This motion was granted by Judge Real, and the Court entered its orders of dismissal and injunction on March 12, 1992.

[Judge Real also granted a motion for sanctions and entered an order assigning certain patents to the United States Marshall for judicial sale.]

"Petitioner separately appealed to the United States Court of Appeals for the Ninth Circuit from the three district court final orders dismissing his complaint (Appeal No. 92-55465) [footnote omitted] awarding Rule 11 sanctions (Appeal No. 9256220), and assigning his patents and copyright (Appeal No. 92-56475). The Ninth Circuit affirmed the decisions of the District Court in their entirety, holding that petitioner's complaint was barred under the doctrine of res judicata, that the District Court did not abuse its discretion in awarding Rule 11 sanctions, and that the assignment of petitioner's patents and copyrights was proper. *See In re James Constant*, 12 F.3d 1105 (9th Cir. 1993) (mem.);

Petition App. A. Although declining to award sanctions against petitioner, the Ninth Circuit also noted in its unpublished memorandum decision that "Constant's claims are wholly without merit, and his appeals are especially frivolous in light of his long history of repeatedly litigating the same claims despite repeated warnings... that he would be sanctioned...." Petition App. A 10.

IV. Background Leading to Appeal to This Court in Cause Number 94-782

Mr. Constant's petition for certiorari in cause number 94-782 involved an adversary proceeding filed by the Chapter 7 Trustee in Mr. Constant's bankruptcy case to recover twenty-two patents fraudulently conveyed by debtor to his wife, Argery Constant. Debtor attempted to intervene in the adversary proceeding against his wife, but that motion was denied. The bankruptcy court, after trial, set aside the conveyances. Mrs. Constant appealed this judgment to the District Court, and Mr. Constant also appealed the denial of his motion to intervene. From the District Court's dismissal of both appeals and award of sanctions, the Constants appealed to the Ninth Circuit, which affirmed the actions of the District Court and imposed additional sanctions. The Constants then filed a petition for review which this Court denied by Order issued January 9, 1995.

ARGUMENT

I. The Ninth Circuit's Pre-Filing Review Order Is A Valid Exercise of its Inherent Power to Prevent Vexatious and Frivolous Appeals.

Respondent Advanced Micro-Devices, Inc. was not a party to the proceeding which led to issuance of the October 20, 1994 pre-filing review order of the Court of Appeals, and it has not yet been directly affected by, or benefitted from that order. Respondent will therefore limit its main argument in this brief to the second question presented. Respondent notes, however, that the pre-filing order appears to be a valid exercise by the Ninth Circuit of its power to prevent judicial proceedings before it from being used for abusive or vexatious purposes.

> A court has inherent power to determine whether its process is used for the purpose of vexation or fraud, instead of the single purpose for which it is intended--the adjudication of bona fide controversies. It is the duty of the court to prevent such abuse, and a dismissal of the cause is an appropriate way to discharge that duty.

Pueblo De Taos v. Archuleta, 64 F.2d 807, 813 (10th Cir. 1933). *See also*, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), *reh. den.* 501 U.S. 1269 (1991); *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927); *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

II. An Extraordinary Writ, A Drastic Remedy Intended For Use Only in Exceptional Cases, Is Clearly Inappropriate.

Petitioner, who has finally exhausted his avenues for appellate review in his persistent attempts to relitigate the same issues time and again, has now tried yet another approach.

This Court has expressly cautioned litigants that a writ issued under 28 U.S.C. § 1651(a) is a matter of the Court's "discretion, sparingly exercised", and that discretion is reserved for situations where "there are present exceptional circumstances". Supreme Court Rule 20.1. The rule limits this unusual remedy to litigants who cannot obtain "adequate relief...in any other form or from any other court." *Id.*

Petitioner Constant submits that the requirement of no other adequate remedy is satisfied here because "all appeals have been finally exhausted". Petition 5. It is precisely for that reason, *i.e.*, because all of Mr. Constant's arguments in his many appeals have been resolved against him, that this Court should dismiss the petition. In *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947), this Court stated,

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal

> counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

Accord, In re Sindram, 498 U.S. 177, 179 (1991), *reh. den.* 498 U.S. 1116 (1991) ("[T]he granting of an extraordinary writ is, in itself, extraordinary.")

Just as extraordinary writs of *mandamus* are not to be used as a substitute for appeal *before* a litigant has had an opportunity to appeal, they are not an appropriate substitute for an appeal *after* a decision has been rendered by lower court. *Ex parte Morgan*, 114 U.S. 174 (1885). In *Morgan*, the Court stated:

> If there is error in the judgment as rendered, it cannot be corrected by *mandamus* but resort must be had to a writ of error or an appeal.

114 U.S. at 175 (citations omitted). Here, petitioner has pursued every avenue of appeal, including seven petitions to this Court for writs of certiorari to the Federal Circuit and two petitions for writs of certiorari to the Ninth Circuit. Therefore, issuance of a writ could not be "in aid of the Court's appellate jurisdiction", as required by Rule 20.1, because the Court's appellate jurisdiction has already been sought, and his petitions for certiorari denied, in the exercise of that appellate jurisdiction.

Extraordinary writs may be appropriate in cases where a court has exceeded its jurisdiction or refused to exercise its jurisdiction, *see, e.g.*, *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943) and cases cited therein, or where appellate review may be defeated if a writ is denied, such as *State of Maryland v. Soper*, 270 U.S. 9, 29-30 (1926), but such a situation does not obtain here.

Nor can Mr. Constant establish any abuse of discretion by the Ninth Circuit. In *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953), this Court reviewed the action of the Fifth Circuit in granting a motion to sever and transfer a criminal case for improper venue in the context of a petition for extraordinary writ. In denying the writ, the Court observed that the ruling by the district judge was made "in the course of the exercise of the court's jurisdiction to decide issues properly brought before it." *Id.* at 382.

> The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in De Beers Consolidated Mines v. United States, 1945, 325 U.S. 212, 217, 65 S. Ct. 1130, 1133, 89 L. Ed. 1566. This is not such a case.

346 U.S. at 383. The Court also stated that the petitioner had not met the burden of showing that its right to issuance of the writ was "clear and indisputable". *Id.* at 384.

Accord, Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 402 (1976) ("...to be invoked only in extraordinary situations."); *Will v. United States*, 389 U.S. 90 (1967) ("drastic and extraordinary" remedy). In his petition for issuance of an extraordinary writ, Mr. Constant sets forth no "exceptional circumstances warranting the exercise of the Court's discretionary powers". Sup. Ct. R. 20.1.

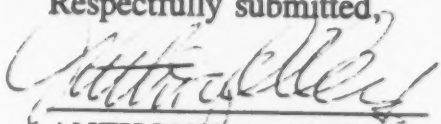
Petitioner and respondents have previously briefed and argued the issues claimed to justify an extraordinary writ many times, in many federal court proceedings. His arguments have been fully considered and resolved against him. Once again, and this time, finally and conclusively, this Court should deny relief to this vexatious and recreational litigant.

CONCLUSION

For the reasons set forth above, the Petition for Extraordinary Writ should be denied. Respondent also submits that an award of sanctions against petitioner, in the form of respondent's attorneys' fees and costs, would be appropriate under the circumstances.

Date: February 15, 1995

Respectfully submitted,



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